

## REMARKS

In the Office Action, Claims 1, 3-14, 16-21, 23-26 and 28 are rejected under 35 U.S.C. §112, second paragraph; Claims 1-7, 14-19, 21-23, 25 and 27-28 are rejected under 35 U.S.C. §102; Claims 1-28 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting; and Claims 8, 10-13, 20, 24 and 26 have been objected. Claim 9 has been amended; and Claims 29-32 have been added. Attached hereto is a marked-up version of the changes made to the claims by the current amendment. The attached page is captioned "**Version with Markings to Show Changes Made.**" Applicants respectfully submit that the rejections have been overcome or are improper in view of the amendments and for the reasons set forth below.

In the Office Action, Claims 1, 3-14, 16-21, 23-26 and 28 are rejected under 35 U.S.C. §112, second paragraph. The Patent Office alleges that the claimed terms "reduced" or "reducing" is a relative term which renders the claims indefinite.

At the outset, Claim 9 has been amended to delete the claimed terms "in an amount sufficient for reducing brittleness of the matrix." As such, Claim 9 should be allowable as indicated by the Patent Office on page 4 of the Office Action. Further, Claims 10-13 should be allowable as well as each of these claims depends from independent Claim 9 and thus, incorporates each of the features of independent Claim 9 as a matter of law. Applicants note for the record that the amendment to Claim 9 was made for clarification purposes and thus Applicants did not intend to disclaim any subject matter in view of same. Therefore, Applicants believe that Claims 9-13 fully comply with 35 U.S.C. §112, second paragraph and thus, should be passed to allowance as discussed above.

With respect to the remaining claims at issue, Claims 1, 14, 21 and 25 are the sole independent claims. Claim 1 recites a dried pet food that includes, in part, a humectant in an amount sufficient for reducing brittleness of the matrix; Claim 14 recites a dried cat food kibble that includes, in part, a humectant in an amount sufficient for reducing brittleness of the matrix; Claim 21 recites a method of reducing calculus and plaque buildup on a pet's teeth by administering to the pet a dried pet food that, in part, has a reduced brittleness; and Claim 25 recites a method of reducing calculus and plaque buildup on a cat's teeth by administering to the pet a dried kibble that, in part, has reduced brittleness.

Contrary to the Patent Office's position, Applicants' believe that the claim terms "reduced" or "reducing" are not indefinite in meaning. Indeed, Applicants have surprisingly found that the incorporation of a humectant and an insoluble fiber within a gelatinized matrix can significantly reduce the brittleness of the pet food. See, Specification, p. 3, lines 1-3. Clearly, this would suggest to one skilled in the art that the addition of a humectant and an insoluble fiber in any suitable amount can be used to reduce the brittleness of the pet food.

*from what?*

Further, the Specification, by way of example and without limitation, discloses various amounts of the humectant and the insoluble fiber that can be added to the gelatinized matrix to reduce the brittleness of the pet food. See, Specification, for example, page 3, lines 8-11. Thus, Applicants believe that the Specification considered in its entirety would reasonably apprise one skilled in the art of the meaning and scope of the terms "reduced" or "reducing" as defined by the claimed invention. Therefore, Applicants believe that Claims 1, 3-8, 14, 16-21, 23-26 and 28 fully comply with the requirements of 35 U.S.C. §112, second paragraph.

Accordingly, Applicants respectfully request that this rejection be withdrawn.

In the Office Action, Claims 1-7, 14-19, 21-23, 25 and 27-28 are rejected under 35 U.S.C. §102 in view of U.S. Patent No. 5,407,661 ("Simone"). The Patent Office essentially asserts that *Simone* discloses each and every feature of the claimed invention. Applicants believe that this rejection is improper as detailed below.

Of the pending claims at issue, Claims 1, 14, 21 and 25 are the sole independent claims. Independent Claims 1 and 14 relate to a dried pet food and a dried cat food kibble, respectively. Independent Claims 21 and 25 relate to methods of reducing calculus and plaque buildup on a pet's teeth (Claim 21), such as a cat's teeth (Claim 25). As recited in each of these claims, the dried pet food includes, in part, a gelatinized matrix with a protein source, a carbohydrate source, about 2% to about 15% by weight insoluble fiber, a humectant and a moisture content of less than 10% by weight.

As previously discussed, Applicants have surprisingly discovered that the dried pet food of the claimed invention can significantly reduce the brittleness of the pet food. This can be done without compromising the hardness of the pet food that is necessary to achieve mechanical cleaning by abrasion. In doing so, the pet's teeth can penetrate into the pet food for a longer distance prior to the breaking of the pet food. In this regard, the pet's teeth can be in contact for a longer period of time. This subjects the pet's teeth to the abrasive effect of the pet food for a

longer time, thus effectively reducing the calculus and plaque buildup on the pet's teeth. See, Specification, for example, page 3, lines 1-6. Moreover, Applicants have demonstrated that the dried pet food of the claimed invention can exhibit significantly improved cleaning of a pet's teeth, even as compared to commercially available dried pet foods. See, Specification, pages 7-10. *not unexpected*

Applicants do not believe that *Simone* discloses or arguably suggests at least a number of features of the claimed invention. "Under 35 U.S.C. §102, anticipation requires that each and every element of the claimed invention be disclosed in the prior art ..." *Akzo NV v. U.S. International Trade Commission*, 1 USPQ2d 1241, 1245 (Fed. Cir. 1986). The Court of Appeals for the Federal Circuit has held that "a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a *single* prior art reference." *Verdegaal Bros. v. Union Oil of California*, 814 F.2d 628, 631 (Fed. Cir. 1988) (*emphasis added*). Clearly, *Simone* cannot be relied on to anticipate the claimed invention.

Foremost, Applicants believe that *Simone* is clearly deficient with respect to a dried pet food that has a moisture content of less than 10% by weight as required by the claimed invention. Indeed, *Simone* discloses that the moisture level is equal to or greater than 12% by weight. In fact, the moisture content in *Simone* is preferably 15% to 25% by weight. See, *Simone*, for example, col. 5, lines 5-10. *Although Simone discloses a moisture content of 10 % by weight*, Applicants believe that the clear focus of *Simone* is to equate this moisture level to an intermediate product and not a final product contrary to the Patent Office's position. *X and then it's dried*

In any event, even assuming *Simone* does disclose a final product having a moisture content of at least 10% moisture by weight, which it does not, the anticipation rejection is still not proper. As previously discussed, each of the claims at issue require a moisture content of less than 10% by weight. In this regard, there is no overlap of the claimed ranges with respect to the moisture content under any which may pertain to *Simone*. Based on at least this reason, Applicants believe that the anticipation rejection fails. *bottom col. 5 says dried to 10%*

Further, Applicants believe that *Simone* fails to disclose or arguably suggest a dried pet food that includes, in part, an insoluble fiber content ranging from about 2% to about 15% as required by the claimed invention. Contrary to the Patent Office's purported calculations, the insoluble fiber content as taught by *Simone* is above the 15% level of insoluble fiber as claimed.

In this regard, the Patent Office's insoluble fiber calculations do not reflect the true

disclosure of *Simone* as the Patent Office merely refers to the starch component and corn flour in the calculation. Yet, the *Simone* Example discloses a pet food product that includes 32.58% by weight of corn cob fractions in addition to 45.42% by weight of wheat starch. See, *Simone*, column 7. Indeed, corn cob fractions typically include 35% by weight of cellulose, 40% by weight of pentosans and 15% by weight of lignin. This suggests that corn cobs can include over 50% by weight of insoluble fibers. See, *Kent. et al.*; Technology of Cereals; Pergamon UK; 1994, p. 305 attached hereto as Exhibit A. Thus, Applicants believe that the Patent Office's calculations are clearly erroneous. In view of same, one skilled in the art would consider the insoluble fiber content of the *Simone* pet food product distinguishable from the insoluble fiber content as required by the claimed invention.

*May include optional. See col. 3. Not limited to examples. Just as app't. is not.*

With respect to the dried pet food feature of the claimed invention, Applicants do not believe that *Simone* discloses same. Contrary to the Patent Office's assertions, the clear emphasis of *Simone* is to provide a chew pet product that is a meal supplement and thus not an entire meal as required by the dried pet food of the claimed invention. Just because the pet product of *Simone* is edible or can be eaten as asserted by the Patent Office, does not necessarily mean that its product can be considered a complete meal. Indeed, *Simone* clearly indicates that its chew pet product is given together with a diet of commercial canned dog food. See, *Simone*, col. 8, lines 26-34.

*See M. & D. col. 8, lines 26-34. J.D. Chewed & swallowed. We recognize that it is not a meal in itself. It is a supplement of a meal.*

Moreover, the Patent Office suggests that the density features as required by Claims 6, 12 and 18 of the claimed invention are inherent in view of *Simone*. This is clearly improper.

At the outset, the Patent Office assumes that the *Simone* pet food discloses each of the ingredients of the dried pet food as claimed. Contrary to the Patent Office's position, *Simone* clearly is deficient with respect to the dried pet food of the claimed invention as previously discussed.

In any event, the Patent Office's bald assertion that the density features would necessarily be inherent is clearly insufficient to establish anticipation by inherency. Of course, mere probabilities or possibilities are not enough to establish inherency. Indeed, the Patent Office appears to disregard other factors that may impact the density, such as processing conditions. Therefore, Applicants believe that one skilled in the art would consider the purported density of the pet food product in *Simone* distinguishable from the density features as required by the claimed invention.

*No*

Based on at least these noted reasons, Applicants believe that *Simone* is clearly deficient with respect to the claimed invention. Therefore, Applicants respectfully submit that *Simone* fails to anticipate or arguably render obvious the claimed invention.

Accordingly, Applicants respectfully request that this rejection be withdrawn.

In the Office Action, Claims 1-28 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting. More specifically, Claims 1-28 are rejected in view of Claims 1-33 of co-pending U.S. Patent Application No. 10/037,941; and Claims 1-28 are provisionally rejected in view of Claims 1-20 and 24 of co-pending U.S. Patent Application No. 09/154,646. In response, Applicants respectfully submit that upon notice of allowability of either the present application or the co-pending applications discussed above that a Terminal Disclaimer will be filed to address this rejection. Therefore, Applicants believe that they have been fully responsive to this provisional rejection at this stage in the prosecution.

In the Office Action, the Patent Office objects to Claims 8, 10-13, 20, 24 and 26 but asserts that these claims would be allowable if rewritten in independent form and that have overcome the rejection under 35 U.S.C. §112 as previously discussed. At the outset, Claims 10-13 should be allowable as each depend from amended independent Claim 9 as previously discussed.

With respect to the objection to Claim 8, 20, 24 and 26, Applicants have added new Claims 29-32. In this regard, Claim 29 essentially recites the limitations of independent Claim 1 in addition to Claim 8; Claim 30 essentially recites the limitations of independent Claim 14 in addition to Claim 20; Claim 31 essentially recites the limitations of independent Claim 21 in addition to Claim 24; and Claim 32 essentially recites the limitations of independent Claim 25 in addition to Claim 26. Further, Applicants believe that newly added Claims 29-32 fully comply with 35 U.S.C. §112 for substantially the same reasons as discussed above in response to the rejection under 35 U.S.C. §112. Accordingly, Applicants believe that Claims 9-13 and newly added Claims 29-32 should be allowable.

For the foregoing reasons, Applicants respectfully submit that the present application is now in condition for allowance and earnestly solicit reconsideration of same.

Respectfully submitted,

BELL, BOYD & LLOYD LLC

BY 

Robert M. Barrett  
Reg. No. 30,142  
P.O. Box 1135  
Chicago, Illinois 60690-1135  
Phone: (312) 807-4204

**VERSION WITH MARKINGS TO SHOW CHANGES MADE**

**In the Claims:**

Claim 9 has been amended as follows:

9. (Amended) A dried pet food comprising a gelatinized matrix comprising a protein source, a carbohydrate source, about 2% to about 15% by weight of insoluble fiber, about 0.5% to about 5% by weight of a humectant ~~in an amount sufficient for reducing brittleness of the matrix~~, and a moisture content ranging from about 3% to about 7% by weight.

Claims 29-32 have been newly added.